Three Thousand and Fifteen ($3,015.00) Dollars in priority to claims of general creditors, or in the alternative that the bank and the receiver be ordered to assign and deliver said check to the plaintiff and that the defendant, R. G. BREWER, INC., be ordered and decreed to pay the principal of said check with interest to the plaintiff (Rec. 9 to 16).

The District Court dismissed all of the three counts in the appellant's amended bill of complaint on motion of the defendant, MEEKER, as Receiver (Rec. 17 to 18). On the appeal to the Circuit Court of Appeals, for the Second Circuit, the Circuit Court of Appeals affirmed the decree of the District Court with respect to the first two counts of the appellant's bill of complaint and reversed the same with respect to the third count (Rec. 23 to 28).

The opinion of the Circuit Court of Appeals written by Circuit Judge Swan, upholds the appellant's contentions with respect to the first two counts, to the effect that the Mamaroneck Bank received the note for collection as appellant's agent pursuant to the provisions of Section 350-a of the New York Negotiable Instruments Law, and that therefore whatever the bank collected upon the note was held in trust for the appellant by the bank as agent, and if traced into the hands of the receiver it might be reclaimed. However, the Circuit Court maintains that there is no identifiable *res* in the hands of the receiver which could be the subject of the trust. Although the Circuit Court agrees that the collecting bank acted as agent for the appellant and therefore held in trust anything collected upon the note, it refuses to apply the equitable doctrine that equity considers that done which in good conscience should be done, and that therefore the bank's acceptance of the check should be considered the same as though

the depositor had cashed his check and handed the cash back over the counter in payment of the note, in which event, such cash would have been considered as a special fund held in trust by the bank belonging to its principal, the owner of the note, for whom the bank, as agent, received such cash in payment.

The appellant contended that, although the depositor had not actually cashed its check and handed the cash back over the counter that in the eyes of a court of equity which treats that done which in good conscience should be done, the acceptance by the bank of the check of its depositor resulted in creating a special deposit out of the cash in the vaults of the bank at that time, which special deposit was held in trust for the benefit of the principal, and that since the bank had not segregated and set aside this amount of money from its general funds at that time but had allowed it to remain commingled with the balance of its funds, the entire mass was impressed with a trust in favor of the appellant. The assets of the bank having passed into the hands of the receiver, increased by the amount of appellant's special deposit wrongfully commingled therewith, those assets are held by the defendant receiver subject to a preferential claim in favor of the appellant for the amount of its special deposit.

This view urged by the appellant is not only supported by decisions of many state courts, but is also supported by the Circuit Court of Appeals, for the Fifth Circuit, in the case of *Davis* v. *McNair,* 48 F. (2d) 494, which case was referred to by this Court in its decision in the case of *Blakey* v. *Brinson,* 286 U. S. 254, and in which this Court stated that such a procedure, if carried out, might form the basis for the inference that a depositor of a bank no longer content with the role of a creditor had sought to estab-

lish a trust fund. The Circuit Court of Appeals, for the Second Circuit, in its opinion, refers to this very decision of this Court in *Blakey* v. *Brinson*, *supra*, but overlooks the careful distinction drawn by this Court in its opinion in the *Blakey* case, indicating that this Court was not opposed to the view expressed in the case of *Davis* v. *McNair*, *supra*, to the effect that the "as if" doctrine applies where the intention to create a trust fund can be inferred from the acts of the parties.

Under the facts existing in the case at bar, no other inference is possible because the relationship between the collecting bank and the plaintiff was that of agent and principal. The collecting bank, therefore, acted throughout with the intention that by accepting the check of its depositor in payment of the note due to its principal, it was doing the very same thing as if its depositor had cashed his check and handed the cash back over the counter to the bank in payment of the note, thereby establishing a trust fund belonging to the principal as the proceeds collected by the bank for the payment of the note.

The other point upon which the Circuit Court of Appeals, for the Second Circuit, refused to sustain the appellant's right to a preferred claim is as follows (Rec. 25 to 27):

The plaintiff, in its first and second causes of action, also predicated its right to a preferred claim against the receiver of the bank by virtue of the provisions of Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments Law of the State of New York, commonly known as the Uniform Bank Collection Code. This state statute grants a lien and impresses a trust on the assets of the collecting bank, in favor of the owner of the note placed with it for

collection. The Circuit Court of Appeals, for the Second Circuit, in its opinion, held that this section of the Uniform Bank Collection Code is contrary to the Act of Congress (12 U. S. C. A. § 194), but also points out, in its opinion, contrary federal authorities on this point, namely, *Royal Mfg. Co.* v. *Spradlin*, 6 F. Supp. 98 (D. C. M. D. N. C.); *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am.*, 4 F. Supp. 569 (D. C. N. Ind.). The opinion of the Circuit Court, for the Second Circuit, thus indicates that there is a conflict of authority in the Federal Courts as to the validity of this section of the Uniform Bank Collection Code.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is therefore the sole federal authority holding this section of the Uniform Bank Collection Code to be in conflict with federal law. The other two circuits which have had occasion to consider this question have held this state statute to be valid. The Uniform Bank Collection Code was first adopted in the year, 1929, and has since become the law in eighteen of the several states. It is only a matter of time before the remaining states will adopt its provisions. The salutary provisions of this uniform state statute should, therefore, not be lightly brushed aside unless its alleged conflict with the Act of Congress is established beyond the hope of reconciliation.

Specification of Errors.

The appellant contends that the Circuit Court of Appeals, for the Second Circuit, erred:

1. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts

of its amended bill of complaint by construing Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, to be contrary to the Act of Congress (12 U. S. C. A. § 194).

2. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts of its amended complaint by failing to establish an identifiable sum held on trust although plaintiff claims a special deposit commingled with the general funds of the bank, which general funds should be impressed with a trust.

ARGUMENT AND LAW.

Summary.

POINT I. The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, is in conflict with the Act of Congress (12 U. S. C. A. § 194), is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.

POINT II. The construction of the Circuit Court of Appeals, for the Second Circuit, to the effect that the appellant has been unable to overcome the difficulty of tracing an identifiable sum of money held on trust when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court, as expressed in the case of *Blakey* v. *Brinson*, 286 U. S. 254.

ARGUMENT I.

The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, is in conflict with the act of Congress (12 U. S. C. A. § 194), is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said act of Congress.

This Court, in the case of *Davis* v. *Elmira Savings* Bank, 161 U. S. 275, carefully distinguished the elements which indicate when a state statute is not in conflict with the Act of Congress which requires the making of ratable dividends. We quote from said decision the portion which sets forth the requirements necessary:

> "True it is that where, by State law a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the Act of Congress, will be enforced. True, also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative of the Act of Congress will be allowed. To that effect are the authorities relied on.
>
> Thus it was said by this Court in *Scott* v. *Armstrong*, 146 U. S. 499, when dealing with the question of setoff: 'The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor, does not belong to

> the bank.' So in the case of *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party deposited had no authority of law to deposit, were not part of the assets to be 'ratably distributed', but must be returned in full to the rightful owner. And, again in *Massey* v. *Fisher*, 62 Fed. Rep. 958, which was a case where an indorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank, the bank failed, the substance of the decision was, that the money did not belong to the bank, but was held by it in trust; and, of course, in that case it was not part of its assets."

Although it was determined, in the *Elmira* case, that the state statute there under consideration did not fulfill these requirements and was therefore in conflict with the federal law, the decision gives recognition to the doctrine that where the lien created by the state statute arises from a relationship different than that of an ordinary creditor and gives rise to a specific lien resulting from the contract which was in being before the insolvency took place, such state statute is valid. The opinion in the *Elmira* case, *supra*, refers again to the cases cited on this point and continues as follows:

> "They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or rights resulting from the contract and which was in being before the insolvency took place."

In the case at bar, the Circuit Court of Appeals, for the Second Circuit, in deciding against the validity of

the state statutes herein, directs attention to two contrary federal authorities (Rec. 26).

The reasoning in both of these cases demonstrate that the Courts in both cases have applied the test specified in the case of *Davis* v. *Elmira Savings Bank*, *supra*, and have found that the Uniform Bank Collection Code gives rise to a specific lien or right resulting from the contract which was in being before the insolvency took place. The Courts, in these two cases, find that insolvency merely fixes the time when certain rights incident to the pre-existing relationship of principal and agent shall be given effect.

We quote from the first of these recent cases, namely, *United States Fidelity and Guaranty Co.* v. *National Bank of America*, 4 Fed. Supp. 569, as follows:

> "The question then resolves itself to the inquiry as to whether the money in the hands of the receiver as collected under the Indiana Uniform Bank Collection Code (Acts 1929, c. 164) was the money of the bank, and so constituted assets, or was the money held in, or impressed with, a trust, and hence not assets of the bank, which the receiver in charge could legally turn over to the Comptroller for ratable distribution under the federal Statute.
>
> There is no doubt that the National Banking Act (See 12 U. S. C. A., §21, *et seq.*) and decisions of the federal courts control in the distribution of the assets of an insolvent national bank. They, the assets, must be ratably distributed to all the creditors, but did the money in controversy constitute assets of the bank? Did the money so collected belong to the bank? Did the bank get title to the money or was it the money of plaintiff held in trust by the insolvent bank?

Defendant argues that to adopt the theory that the Statute of Indiana in controlling on the question of agency is equivalent to holding that each State in the union may adopt rules for distribution of assets of insolvent national banks. The results are not so far-reaching.

The federal rule is that a receiver of an insolvent national bank shall turn over for distribution the assets of the failed bank, not the assets, cash, or property of some other person held by such insolvent bank as agent or in trust. The federal rule does not require that money in the possession of a national bank shall be considered assets.

The Indiana State rule is that money collected as this money was shall be held by the collecting bank as agent. There appears to be no conflict between the federal statute providing for ratable distribution of assets and the decisions of the federal Courts under that Statute and the Uniform Bank Collection Code of Indiana. National banks are amendable to the laws of the State in which they operate. They are governed in all respects by the State law, except where the State law contravenes the federal law, in which case the federal law is controlling. See *McClellan* v. *Chipman*, 164 U. S. 347, 17 S. Ct. 85, 41 L. Ed. 461, where the Supreme Court of the United States lays down the rule in the following language: 'The rule being the operation of general State laws upon the dealings and contracts of national banks; the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.'

The Court in this opinion used the following language: 'The purpose and object of Congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the State law, and thereby invest them as federal agencies with local strength, while at the same time preserving them from undue State interference wherever Congress, within the limit of its constitutional authority, has expressly so directed, or wherever such State interference frustrates the lawful purpose of Congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.'

The State law of Indiana provides explicitly that the fund in question shall be held as agent or subagent. The federal law contains no contrary provision. To sustain plaintiff's contention is to give effect to the Indiana Code, as well as to the federal acts. To sustain defendant's contention would be to destroy the effect of the Indiana Code as applied to national banks. The constitutionality of the Indiana Uniform Bank Collection Code is not challenged. It is and was in full force and effect at the time of this transaction.

Sec. 2, Ch. 164 of the Indiana Acts of 1929, page 515, provides that 'where an item is deposited or received for collection, the bank of deposit shall be the agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor.'

Sec. 1 of the same act at p. 514 provides that: 'The term bank shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State.'

No authority has been cited and I think none can be, that directs or permits the appropriation by a

> receiver of funds held in trust or as agent for another person. These funds must be paid over by the receiver to the owner thereof. They do not constitute assets of the failed bank, do not belong to the bank, and the receiver has no right to hold them or pay them over to the Comptroller for distribution or to do anything with them except to turn them over to the rightful owner, the plaintiff in this case."

The reasoning of the opinion in the foregoing case is so clearly applicable to the case at bar as to make it unnecessary to use further words to emphasize its application.

The foregoing case was affirmed on appeal by the Circuit Court of Appeals, for the Seventh Circuit, and the opinion of the Circuit Court is reported in 71 F. (2) , 618. We quote from the decision of the Circuit Court of Appeals on this point as follows:

> "There is nothing in the Indiana statutes that attempts to interfere with the Comptroller's distribution of the bank's assets. The proceeds of appellee's check were not rightfully a part of its assets, and there is no effort here to secure a preference over any creditor in the distribution of the assets, or to interfere with the Comptroller in that respect. The effort on the part of the appellee is merely to recover its own property which under the laws of Indiana was held in trust by the bank as agent for appellee. We know of no federal pronouncement which holds that a national bank may include in its distributable assets to its general creditors a fund which is held by it as trustee, when that fund has been traced into the hands of the receiver. There has been a contrariety of opinion

among the State Courts as to when a trust relationship arises with respect to banks acting as collectors of commercial paper, but not as to the Comptroller's duty when once that relationship is established. The right of Indiana to establish that relationship by legislative enactment was well within its powers and is controlling here."

The other case cited in the opinion of the Circuit Court for the Second Circuit in the case at bar, on the same question is equally strong, in upholding the validity of a similar state statute. It is the case of *Royal Mfg. Co.* v. *Spradlin,* 6 Fed. Supp. 98 decided February 5th, 1934. We quote from said decision as follows:

"The mere fact that the proviso is attached to a section of the North Carolina statute dealing with the distribution of the assets of insolvent banks does not confine its operation to insolvent banks. It clearly establishes a lien in favor of one who sends by mail, etc., a draft, etc., for collection, with request that remittance be made therefor, and which is collected by charging it to the account in the bank, and failing to remit therefor, or the non-payment of a check sent in payment therefor, which lien attaches to the assets of the bank making the collection from the date of the charge, entry, or collection of any such funds. The lien, therefore, is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, 'from the date of the charge, entry or collection of any such funds.' The lien exists before insolvency and subsequent insolvency does not invalidate it. Moreover, it is not attempting to prefer one creditor over another in cases of insolvency, but the purpose of the act is to make a lien against the assets of any collecting bank until it pays the proceeds of collection

made by it as agent. The language is perfectly plain. It was to put an end to court decisions making the collecting bank a mere common debtor and denying the principal the right to reach his property in the hands of his agent.

The banks receive a fee for collecting drafts sent to them. If a lien attaches in favor of the sender, if sent to a state bank, a national bank would be unable to compete in that field, with a state bank, if a similar lien does not attach against the assets of a national bank. Assuming then that the state statute is applicable to national banks, does it conflict with the acts of Congress or frustrate the purposes for which national banks are created? Congress has not legislated at all on the liabilities of a bank as collecting agent. It has provided for the distribution of the assets of insolvent banks. 12 U. S. C. A., §194. But the provisions of this statute and 12 U. S. C. A., §91 do not conflict with the North Carolina statute, nor does that statute in any way frustrate the objects for which national banks are created.

The case of *Dakin* v. *Bayly*, 290 U. S. 143, involved the construction of a state statute in regard to set-off, and the decision turned on the construction of the state statute. It is an authority also for the proposition that the collecting bank is agent, not alone to collect, but to remit the proceeds of the collection. In view of this decision and of the others cited above, and of the state statute here involved, the assets in the hand of the receiver and subject to the lien created by the North Carolina statute, and the receiver must pay it out of the assets."

The Circuit Court of Appeals, in its opinion, in the case at bar, does not attempt to indicate in what re-

spect Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments Law of the State of New York, is contrary to the Act of Congress (12 U. S. C. A., §194).

Now, in what respect does this state statute, constituting a section of the Uniform Bank Collection Code, conflict with, or in any way, invade a field occupied by the Acts of Congress? Where, in the National Banking Act, or elsewhere, does Congress attempt to define a trust and to provide for a disposition thereof in the event of insolvency of National Banks? To be sure, 12 U. S. C. A., §194 provides by fair implication and judicial interpretation that the Comptroller of the Currency shall, upon insolvency, distribute the assets of National Banks ratably to creditors. But, the Uniform Bank Collection Code in nowise attempts to deal with the distribution of assets to creditors. Article 19-A of the New York Negotiable Instruments Law, which constitutes what is commonly known as the Uniform Bank Collection Code, states that the relation between the owner of items deposited for collection and banks receiving them for that purpose, is that of principal and agent, and establishes a lien upon the assets of the bank making the collection in favor of the owner of the item placed with the agent bank for collection. Since agents do not acquire title to property entrusted to them by their principals, the proceeds of items collected by banks, as agents, do not in any sense become the assets of the collecting bank.

It is our contention that the National Banking Act does not expressly, or by implication, assume to define the character of the relation created when a National Bank receives an item for collection while it is a going concern, nor does it attempt to deal with the question of whether, or not, such transaction amounts to a trust entitling the owner to a preference upon suspension; that the Uniform Bank Collection Code merely creates

a lien against the assets of the collecting bank based upon the contract for collection, which predicates the existence of a relationship of principal and agent from the inception between the owner of the note and the bank. We further submit that this lien comes into being before the insolvency takes place, and hence the Uniform Bank Collection Code does not seek to regulate the distribution of the assets of an insolvent National Bank.

The *Elmira* case was cited with approval, but distinguished, in *McClellan* v. *Chipman,* 164 U. S. 347, where, after stating the general rule as follows at page 356:

> "National banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional'."

The opinion distinguishes the *Elmira* case, saying at page 360:

> "Nor is there anything in the opinion of this Court in *Davis* v. *Elmira Savings Bank, supra,* which supports the argument of the plaintiff in error. There the conflict between the State and Federal law was found to be express and irreconcilable, bringing that case, therefor, under the exception of the general rule. The opinion carefully confined the ruling there made to such a case, so

as to render it inapplicable in a case like the one now before it."

This Court had recent occasion to cite the *Elmira* case and to hold a state statute, creating a lien prior to insolvency, to be valid. We refer to the case of *Lewis* v. *Fidelity and Deposit Co. of Maryland*, 54 Sup. Ct., Rep. 848, 852, from which we quote as follows:

"Sections 50 and 52 (see 12 U. S. C. A., §194 and §91 and note) do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. *Scott* v. *Armstrong*, 146 U. S. 499, 510, 13 S. Ct., 148, 36 L. Ed. 1059; *Earle* v. *Pennsylvania*, 178 U. S. 499, 454, 20 S. Ct. 915, 44 L. Ed. 1146. The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. It resembles the lien which is enforced when seizure is made by the creditor, within four months of bankruptcy, of property claimed under an after-acquired property clause of a mortgage. *Thompson* v. *Fairbanks*, 196 U. S. 516, 25 S. Ct. 306, 49 L. Ed. 577; *Humphrey* v. *Tatman*, 198 U. S. 91, 75 S. Ct. 567, 49 L. Ed. 956. It resembles also those cases where, under the common law of distress or under a statutory lien, described by the courts as 'Inchoate' or 'dormant', a landlord, within four months of bankruptcy, seizing or levying upon whatever property was on the tenant's premises, was held to have a valid lien. *Henderson* v. *Mayer*, 225 U. S. 631, 32

S. Ct. 699, 56 L. Ed. 1233; *Richmond* v. *Bird,* 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543. Compare *Minnich* v. *Gardner,* 292 U. S. 48, 54 S. Ct. 567, 78 L. Ed.— decided April 2, 1934. The case at bar is unlike *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700, relied upon by the receiver, where a New York statute dealing with the administration of insolvent banks provided that, in the event of insolvency, the deposits of a savings banks would be entitled to a preference."

The Uniform Bank Collection Code represents a further advance in the laborious struggle of public spirited citizens and great legal minds of our country to codify and make uniform the laws of each jurisdiction, thereby clearing away the havoc and confusion of conflicting judicial interpretations. The benefit resulting to the commercial community by rendering this law certain and uniform in all jurisdictions is self-evident and needs no elaborate argument to lend it favor.

Our research discloses that the opinion of the Circuit Court of Appeals, for the Second Circuit, in the case at bar, is the sole federal authority holding the provisions of the Uniform Bank Collection Code, creating a lien in favor of the owner of the item deposited for collection, to be in conflict with the Act of Congress, 12 U. S. C. A., §194. The question seems to have been considered only in two other circuits to date, and both of them have determined in favor of the validity of the Uniform Bank Collection Code on this point. (*Royal Mfg. Co.* v. *Spradlin, supra; U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra.*)

We, therefore, believe that the validity of the Uniform Bank Collection Code should be upheld by this Court, if it is at all possible to reconcile its provisions with the Act of Congress.

The foregoing argument indicates that the lien created and the specific right arising in favor of the owner of the item placed with the bank for collection, comes into being before the insolvency takes place and is therefore not an attempt by the state to regulate the distribution of the assets of an insolvent National Bank.

We, therefore, respectfully submit that there is no conflict between the Uniform Bank Collection Code and the Act of Congress, and that therefore the decision of the Circuit Court of Appeals on this point should be reversed.

ARGUMENT II.

The construction of the Circuit Court of Appeals for the Second Circuit to the effect that the appellant has been unable to overcome the difficulty of tracing an identifiable sum of money held on trust when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court, as expressed in the case of *Blakey* v. *Brinson*, 286 U. S. 254.

In *Blakey* v. *Brinson, supra,* this Court determined that a debtor and creditor relation existed throughout between the bank and its depositor in said case, but it appears, in the opinion, that this Court apparently does not disagree with the Circuit Court of Appeals, for the Fourth Circuit, in its reasoning wherein it sought to apply the "as if" doctrine. We quote from the decision in the case of *Blakey* v. *Brinson, supra:*

> "The Court below thought that the legal consequences to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a

> check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; 85 Atl. 281; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash., 33; 225 Pac. 825; *State* v. *American Exchange Bank,* 112 Neb. 834; 201 N. W. 895."

After citing the contrary authorities on this point, this Court indicates, in said opinion, a passive approval of the "as if" doctrine where the facts warrant the inference that a debtor and creditor relationship was not intended, and the establishment of a trust fund was contemplated, by expressing its view with respect to such a situation as follows:

> "Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund."

In the case of *Davis* v. *McNair, supra,* it was clearly shown that to support a trust, it is not necessary to have augmentation in the sense of new money being brought into the bank from the outside where the facts warranted the inference that the relation of the bank towards money which it theretofore held on general deposit was changed from that of owner to that of agent or trustee. In said case, the Court held that by what was done the relations of the parties with respect to the funds were so changed that thereafter the deposit was in the nature of a special fund, having the

trust features of a special deposit. Such special deposit, though not segregated and set aside, and though it be commingled with the remaining funds of the bank, does not lose its trust features because it is confounded in the general mass. The modern rule holds that to accomplish the ends of justice, a trust will be impressed upon the entire mass.

Frelinghuysen v. *Nugent,* 36 Fed. 229, 239;
Peters v. *Baine,* 133 U. S. 670;
Brennan v. *Tillingast,* 201 Fed. 609;
Quin v. *Earle,* 95 F. 728, 731;
Central Nat. Bank v. *Conn. Mutl. Life Ins. Co.,* 104 U. S. 54, 26 L. Ed. 693;
Knatchbull v. *Hallett,* 13 Ch. Div. 696; notes 32 Am. St. Rep. 129; L. R. A. 1916, C. 31;
Poisson v. *Williams,* 15 F. (2d) 582;
Schumacker v. *Harriet,* 52 F. (2d) 817;
Tucker v. *Newcomb,* 67 F. (2d) 177.

The Circuit Court of Appeals, for the Fifth Circuit, carefully expressed itself in a well reasoned decision on this question in the case of *City of Miami* v. *First National Bank of St. Petersburg,* 58 F. (2) 561, which said decision was cited with approval by this Court in the case of *Dakin* v. *Bayly,* 290 U. S. 143.

The same case came up for consideration a second time before the said Circuit Court after judgment, and in the second opinion the Court reversed its former position, basing its new decision on the ground that no identifiable *res* had been established upon which the trust could rest. The second decision of the Circuit Court of Appeals, for the Fifth Circuit, evidently was rendered without knowledge of the fact that this Court had, in the case of *Dakin* v. *Bayly, supra,* cited its first opinion with approval.

A comparison of the latter opinion in the said case of *City of Miami* v. *First National Bank of St. Petersburg,* 69 F. (2d) 346, with the former opinion in the same case discloses that the reasoning in the second opinion cannot be reconciled with the reasoning of the first. Although the first opinion carefully and exhaustively considers every element involved, it contains no hint that an all destroying principle, in the form of a requirement of an identifiable *res*, lurked in the background. This question, of an identifiable *res,* upon which the second opinion is based is also one of the grounds upon which the Circuit Court of Appeals, for the Second Circuit, in this case bases its denial of relief to the plaintiff. It conflicts with the "as if" doctrine passively approved by this Court in the case of *Blakey* v. *Brinson, supra,* and has served to add even greater confusion to conflict of views which previously existed on this point in several circuits.

In the case at bar, it is conceded that the relationship between the appellant, OLD COMPANY'S LEHIGH, INC., and THE FIRST NATIONAL BANK IN MAMARONECK was that of agent and principal and that at no time was the relationship between them that of creditor and debtor. The parties are presumed to have contracted with reference to the state statute, known as the Uniform Bank Collection Code, fixing their relationship as that of principal and agent, and therefore whatever the agent bank collected on the note for its principal was received by such agent bank as the property of the principal and held in trust for the principal.

The sole question remaining, therefore, for determination, is whether the doctrines and principles of equity so carefully and laboriously developed by the Courts in this country and in England in order to mete out justice in accordance with the dictates of good

conscience, in situations where the law does not provide an adequate remedy, should be allowed to apply upon the state of facts existing in the instant case, or whether these principles of equity should be ignored because of the Act of Congress (U. S. C. A. § 194). We respectfully submit that there is no command, either express or implied, in the Act of Congress providing for ratable dividends, which compels the Courts to disregard the principles of equity that would apply if the litigation involved the agent bank and its principal as the sole parties.

This Court has held in the case of *Dakin* v. *Bayly*, 290 U. S. 143, that the relationship and the rights of the parties in a case of this character becomes fixed at the moment of insolvency. The receiver of the bank, therefore, is in no position to assert greater privileges and immunities than the bank itself could have asserted had there been no insolvency.

If this controversy were solely between the appellant and the Mamaroneck Bank, there can be very little doubt that the Court would hold that when the Mamaroneck Bank accepted the check of the maker of the note drawn against the account of the maker and surrendered the note to the maker, that, in the eyes of a Court of equity, the situation would be considered as no different than that which would have arisen if the maker of the note had gone through the formality of withdrawing the amount of the note, namely, Three Thousand and Fifteen ($3,015.00) Dollars and had immediately paid said sum of money over the counter to the teller in payment of said note. The mere fact that such formality was not gone through does not prevent a Court of equity from regarding and treating that as done which in good conscience ought to have been done.

> "The true meaning of this maxim is, that equity will treat the subject matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been, executed." *1. Pomeroy's* Equity, 2nd Edition Sec. 364 (note) Section 373.

At the time the maker of the note, in the instant case, drew his check to the order of the bank, he had on deposit more than sufficient to pay the amount of the note. Equity looks at the substance rather than the form of things. Since equity considers that done which in good conscience ought to have been done, and since the bank was then open for business, the result was the same as if the maker of the note had withdrawn the cash and paid it back over the counter in payment of the note, in which event the amount of cash delivered in payment of the note over the counter would have constituted monies belonging to the principal, who had left the note with the bank as its agent for collection. This fund would have represented an identifiable sum of money which passed to the receiver when the bank closed its doors and augmented the assets passing to the receiver; and though this fund was commingled with the other monies of the bank, the trust would not be destroyed, but would be impressed upon the entire mass.

Butler v. *Western German Bank,* 159 Fed. 116;
Frelinghuysen v. *Nugent, supra;*
Peters v. *Baine, supra;*
Brennan v. *Tillingast, supra;*
Quin v. *Earle, supra;*

Central Nat. Bank v. *Conn. Mut. Life Ins. Co., supra;*
Knatchbull v. *Hallett, supra;*
Poisson v. *Williams, supra;*
Schumacker v. *Harriet, supra;*
Tucker v. *Newcomb, supra.*

After applying the principles of equity upon the facts in the case at bar there remains no difficulty of tracing into the hands of the receiver an identifiable *res* upon which the trust is to rest. The identifiable trust *res* would be present if the check had been cashed and the cash paid over the counter to teller; it is likewise present though the formality of cashing the check was not gone through since equity considers that done which should have been done in good conscience.

The fallacy that to support a trust there must be augmentation in the sense that new money is to be brought into the bank from the outside where the relation of the bank towards money which it heretofore hold on general deposit was changed from that of owner to that of agent or trustee, was exposed in the case of *Davis* v. *McNair,* 48 F. (2d) 494. We quote from said decision as follows:

> "By that transaction, the bank ceased to be the plaintiff's debtor for the amount which previously had been on deposit subject to check, and in effect accepted from the plaintiff the same amount in cash, to be held by it, not as its own property, but as an agent charged with the duty or trust to use it in paying for the bonds to be purchased, and of keeping the amount so received separate from its general assets. An effect of the bank's failure to keep the sum of money so received by it segregated from its own assets and permitting

> it to be commingled with its general funds was that the sum was added to funds then owned by the bank, and the plaintiff became entitled to have the amount of his money delivered to the bank as agent withdrawn from the bank's general funds with which it was commingled and used in the way the bank was obligated to use it. The assets of the bank having passed into the hands of the receiver, the defendant, increased by the amount of plaintiff's money wrongfully commingled therewith, those assets are held by the defendant subject to a preferential claim in favor of the plaintiff for the amount of his money which was so wrongfully commingled with funds owned by the bank."

The equities in favor of the appellant, in the instant case, are far stronger than those that existed in the aforecited case of *Davis* v. *McNair, supra,* because in the case cited a debtor and creditor relationship had previously existed between the bank and its depositor, while in the instant case, the appellant and the Mamaroneck Bank were at no time on a debtor and creditor relationship, but acted throughout as principal and agent.

We have heretofore pointed out that the doctrine in the case of *Davis* v. *McNair, supra,* was considered by this Court in the case of *Blakey* v. *Brinson, supra,* and that the "as if" doctrine there set forth was not disapproved by this Court. If the "as if" doctrine is to be given recognition, the facts in the case at bar justify its application because it is almost inconceivable that a state of facts could arise in any case where the equities merit the application of the "as if" doctrine to a greater extent than the facts in the instant case do. The unfortunate plight of the owner of a note, who is compelled willy-nilly, by an arbitrary rule of law,

to accept in lieu of the obligation of the maker of a note the obligation of a debtor whom he did not choose, and whom he did not even know, is illustrated to perfection in the instant case. The owner of the item for collection ought to at least be accorded the right, which a principal usually has, to have some say as to whether his agent and trustee for collection shall become his simple debtor for payment.

The appellant, in the case at bar, comes into Court with clean hands and merits the favorable consideration of the Court on the request that the Court apply the equitable principle of considering that done which in good conscience ought to have been done. Therefore, the failure of the depositor to actually cash the check and turn the money back over the counter should be disregarded and the transaction considered the same as if that had actually been done.

On applying this principle of equity, we find that by the acceptance of the check and the surrender of the note, the sum of Three Thousand and Fifteen ($3,015.00) Dollars out of the general deposit of the maker of the note immediately became a special deposit constituting trust monies belonging to the appellant. There is no greater difficulty in identifying and tracing this special fund than would have existed had the cash actually been paid over the counter and returned, and was then commingled with the general funds of the bank, in which event the entire mass would have been impressed with a trust. The effect is the same because in equity the plaintiff became entitled to have the amount of his money in the possession of the bank withdrawn from the general funds with which it was commingled and used in the way the bank was obligated to use it. Since the assets of the bank have passed into the hands of the receiver, augmented by the amount of plaintiff's

money wrongfully commingled therewith, those assets are held by the receiver subject to a trust in favor of the plaintiff for the amount of his money which was so wrongfully commingled with the funds owned by the bank.

Probably, the most complete analysis of the "as if" doctrine, and the reasoning in support thereof, is contained in the opinion of the Court in the case of *Northwest Lumber Company* v. *Scandinavian-American Bank of Seattle, et al.*, 130 Wash. 33; 225 Pac. 825; 39 A. L. R. 922. The facts were as follows:

The bank was the Trustee for bondholders; the Lumber Company was required prior to each due date of principal and interest to deposit with the bank sufficient funds to pay maturing principal and interest. On June 24th, 1921, the Lumber Company had on deposit in said bank subject to its general checking account a sum in excess of $85,000.00. That day it forwarded to the said bank its check for $5,220.00 to meet payments on outstanding obligations due July 1st, 1921. It sent a letter with a check explaining that the purpose of the check was to pay six months' interest on its bond. The check was turned over by the cashier to the person having charge of the trust department of the bank. The check was not marked paid or cancelled and the lumber company's general account was not charged with amount of same. On June 30th, 1921, prior to due date of the interest, the bank was taken over by the state supervisor of banking. The undertaking on the part of the bank to meet the interest payment was not recognized by the supervisor and the lumber company was compelled to make payments through other channels. The Lumber Company presented a claim for preferential payment from assets of bank, and this was not allowed by supervisor. Suit was instituted to en-

force a preference. Judgment was in favor of the Lumber Company in the lower Court and the supervisor appealed. The Appellate Court on appeal affirmed the judgment of the lower Court and in the opinion rendered said:

> "Tested by the rules above stated, it is at once apparent that, had the Lumber company, instead of sending its check to the bank for the amount to become due on the interest payment, sent to the bank the cash for the amount due, it would, under the circumstances shown, have constituted a special deposit which it could have reclaimed in its entirety after the bank passed into the hands of the supervisor of banking, and this notwithstanding the bank might have intermingled the money with its general cash deposits. A like result would have followed had the Lumber Company required its messenger carrying the check to the bank to exact payment of the check, and, after payment, leave the money so received with the bank as a deposit to pay the maturing interest obligation when it became due. The difference between transactions such as these and the transactions in question, it seems clear, is one of manner rather than one of legal effect. By presenting the check to the bank, and directing what disposition should be made of the fund represented by it, the Lumber company sought to collect this part of the debt due it from the bank and deposit the fund for a special purpose. In other words, it sought thereby to change a part of its general deposit into a special deposit. The bank, by accepting the check with knowledge of the purposes of the Lumber company, consented to the change. It thereby lost its right of general lien on the fund, its right of off-set against it, its

title thereto, its right to use it for its own purposes, and had no right with respect to it, other than to pay it out in accordance with the directions of the Lumber company. While the Lumber company could have changed its directions with respect to the fund prior to its actual disposition in accordance with the directions given, the bank had no such right. Its sole right and duty was to carry out the instructions given it by the Lumber company. It follows from these considerations, we think, that the relation of the parties with respect to the fund were changed by the transaction between them; that their relation thereafter with respect to it was not that of debtor and creditor, but that of trustee and *cestui que* trust. As between the immediate parties thereto, we conclude that it cannot be successfully contended that the Lumber company was not entitled to claim the fund as a special deposit.

What reason is there for contending that the fund is not a special deposit as between the Lumber company and the general creditors of the bank? The first of the reasons suggested by the supervisor he states in the following language:

> 'The bank, of course, may be indebted to the plaintiff; but what is the property, the title to which is in the plaintiff? Nothing except the unused check with the letter. To the return of these the plaintiff is entitled. The letter and check were to serve a specific purpose, which, of course, was frustrated by the closing of the bank prior to July 1, 1921. The check coming into the hands of the liquidator of the bank in the same condition as delivered by the plaintiff to the bank, and the check not having been cashed, and no funds substituted in lieu of the check, the plain-

tiff, of course, cannot prevail except as to the return of its check.'

But this reasoning, in our opinion, overlooks the substance of the transaction. The check, it is true, was not marked as paid, nor did the bank set apart from its general funds the amount of money called for by the check into a special fund. But these acts, had they been carried out, would have been here nothing more than evidence of the transaction. The check and letter did not as between the parties represent value. They were mere directions from the one party to the other as to property which in itself alone had value. The subsequent insolvency of the bank in no way changed the original nature of the check and letter, and they do not now have value. To allow a recovery of them only would be to allow a recovery of the shadow, and not the substance. But the argument mistakes the real question at issue. That question is: was there such a segregation of this particular fund from the moneys of the bank as to withdraw it from the general lien of the general creditor? If there was such a segregation, it matters little what means were taken for its accomplishment. Nor do we think it accurate to say that the check was not cashed. Plainly it was cashed as between the parties as to all intents and purposes, by the mere issuance and acceptance of the check with that understanding. The pertinent matter in the objection is the fact that there was no actual segregation of the fund—no separation of it from the bank's general fund. But this objection is answered by the rule with respect to the intermingling of funds. Since there can be a recovery where the bank intermingles its special funds with its general funds, so, on the like

principle, can there be a recovery where the bank leaves a special fund intermingled with its general fund after it becomes its duty to segregate it. The case of *Raybor* v. *Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499, 25 A. L. R. 716, cited in support of the proposition that nothing but the check and letter can be recovered, lends no support to the proposition. In that case the checks under consideration were checks drawn on a solvent bank. They represented a solvent fund, and had value in the hands of the holder, and a recovery of the checks was equivalent to a recovery of the fund, which is not so in the present instance.

The second reason urged is that the situation of the Lumber Company is not different from the situation of other creditors of the bank who held uncashed checks at the time it was closed by the supervisor. But we think there is a difference between the situations. The Lumber Company presented its check at a time when the bank was a going concern, when it was open for the transaction of business, and its check was accepted and (in legal effect) cashed by the bank. In the other instances there was no presentation during the business life of the bank, and no cashing of the checks. The holders of the checks were mere general creditors of the bank, and are not in positions such as to entitle them to claim that there was a withdrawal of the sums represented by the checks from the general funds of the bank and deposited as special funds.

As a final reason against a recovery, it is urged that there was by the transaction no augmentation of the assets of the bank. The fact here assumed is undoubtedly true as applied to the general assets of the bank; that is to say, it is true in the sense

that the bank held no greater assets at the completion of the transaction than it held at its beginning. But it is not our understanding that this is the principle upon which the doctrine of augmentation rests. The equitable right to follow misapplied property into the hands of the parties receiving it depends upon the ability of identifying it, in specie, or the ability of identifying the property with which it has been confused, or into which it has been converted. If this cannot be done there can be no recovery, even though it be shown that the general assets of the estate have been increased to the amount and value of the property. The rule as applied to money which has been intermingled with other money thus means that it must be shown that the mass of money from which it must be taken has been increased by the amount of money which has been misapplied, not that it must be shown that the general assets of the possessor of the money have been increased. In the instant case there is a showing that the money which came into the hands of the supervisor on the insolvency of the bank was greater by the amount of the check than it would have been had the bank performed its duty and made the actual segregation, and in consequence an augmentation of that mass."

In the case at bar, the money which came into the hands of the receiver was augmented by the amount of the special fund belonging to the plaintiff in the sum of Three Thousand and Fifteen ($3,015.00) Dollars and was greater by that amount than it would have been had the bank performed its duty and made an actual segregation. The receiver of the bank cannot assert greater rights than the bank itself could have claimed because the rights of the parties became fixed at the

moment of the insolvency. The *res* upon which the trust is to rest has been identified because equity regards this special fund as having come into existence despite the fact that the formality of cashing the check and paying the money back over the counter was not gone through. Since this special fund was commingled with the general funds of the bank, the entire mass of money is impressed with a trust in favor of the appellant for the amount of this special fund, so wrongfully commingled therewith, and which has passed into the hands of the receiver upon the insolvency of the bank.

CONCLUSION.

It is respectfully submitted that an identifiable *trust res* has been traced into the hands of the receiver representing part of the total cash funds held by the receiver and that the Circuit Court of Appeals, for the Second Circuit, was in error on that point.

It is likewise respectfully submitted that the Circuit Court of Appeals for the Second Circuit was in error in holding that the provisions of Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, conflicts with the provisions of the Act of Congress (12 U. S. C. A. § 194). Therefore, we believe that that part of the decision of the Circuit Court of Appeals, for the Second Circuit which affirms the order of the District Court dismissing the first and second causes of action of the appellant should be reversed.

Respectfully submitted,

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